

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

GERARD CAMPBELL, individually on behalf of
himself and all others similarly situated,

Plaintiffs,

v.

DRINK Daily Greens, LLC, a Delaware limited
liability company,

Defendant.

Case No. 1:16-cv-07176-ILG-PK

**DEFENDANT DRINK DAILY GREENS,
LLC'S REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF MOTION TO
DISMISS COMPLAINT, PURSUANT TO
FEDERAL LAW OF CIVIL
PROCEDURE 12(B)(1) AND 12(B)(6)**

Defendant Drink Daily Greens, LLC (“Daily Greens”) hereby requests that the Court take judicial notice of certain regulations and guidelines promulgated by the U.S. Food and Drug Administration, pursuant to Rule 201 of the Federal Rules of Evidence, for the reasons outlined below.

ARGUMENT

A district court “may judicially notice facts that are ‘not subject to reasonable dispute because [they] ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’” *In re Frito-Lay N. Am., Inc. All Nat. Litig.*, No. 12-MD-2413 RRM RLM, 2013 WL 4647512, at *4 (E.D.N.Y. Aug. 29, 2013) (quoting Fed. R. Evid. 201(b)(2)). Here, Daily Greens requests that the Court take judicial notice of two types of documents: (1) the contents of certain sections of the Code of Federal Regulations; and (2) various publicly available guidelines, documents and websites of the U.S. Food and Drug Administration (“FDA”). Both types of documents are judicially noticeable.

First, courts may properly take notice of the contents of the Federal Register and Code of Federal Regulations. *Id.*; 44 U.S.C. § 1507 (“The contents of the Federal Register shall be judicially noticed . . . ”); 44 U.S.C. § 1510 (The Code of Federal Regulations is a “special or supplemental edition[] of the Federal Register,” and thus included within 44 U.S.C. § 1507).

Second, courts may also take judicial notice of federal “agency letters, policy and guidance documents, websites, and other agency data made available to the public outside of the Federal Register by administrative agencies.” *In re Frito-Lay*, 2013 WL 4647512, at *4; *see also Porazzo v. Bumble Bee Foods, LLC*, 822 F. Supp. 2d 406, 411–12 (S.D.N.Y. 2011); *Cortec Indus., Inc. v. Sum Hldg. L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (holding in ruling on “a motion to dismiss complaint alleging securities fraud, [district court] may review and consider public

disclosure documents required by law to be and which actually have been filed with the SEC . . .”); *Thomas v. Westchester Cty. Health Care Corp.*, 232 F. Supp. 2d 273, 276 (S.D.N.Y. 2002) (when ruling on a motion to dismiss, “a district court may take judicial notice of, among other things, ‘records and reports of administrative bodies.’” (citation omitted)). This includes publicly available documents issued by the FDA. *E.g.*, *Porazzo*, 822 F. Supp. 2d at 412 (taking judicial notice of FDA publications, consumer advisories, policy guides and letters that were “all publicly available on the FDA website”, holding “it is well-established that courts may take judicial notice of publicly available documents on a motion to dismiss.”); *In re Zypreza Prods. Liability Litig.*, 549 F. Supp. 2d 496, 501 (E.D.N.Y. 2008) (finding “[p]ublic documents issued by government agencies such as the [FDA] may also be” judicially noticed); *Jones v. ConAgra Foods, Inc.*, 912 F. Supp. 2d 889, 901 n.6 (N.D. Cal. 2012) (letter to lawyer from FDA was “properly judicially noticeable”).

Accordingly, Daily Greens requests that the Court take judicial notice of the following documents attached hereto as Exhibits.

1. **Exhibit 1:** FDA Guidance for Industry: The Juice HACCP Regulation - Questions & Answers (Aug. 31, 2001), *available at* <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm072981.htm#E>
2. **Exhibit 2:** FDA Juice HACCP Guidance, Section II, Terms and Definitions (Mar. 3, 2004) (Section II and V), *available at* <https://www.fda.gov/Food%20/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Juice/ucm072557.htm>
3. **Exhibit 3:** 21 C.F.R. § 131.3(b)
4. **Exhibit 4:** 21 C.F.R. § 133.3(d)

5. **Exhibit 5:** 21 C.F.R. § 120.24(a)
6. **Exhibit 6:** 21 C.F.R. § 146.140
7. **Exhibit 7:** 21 C.F.R. § 1240.61
8. **Exhibit 8:** FDA, Pasteurization, *available at*
http://www.accessdata.fda.gov/ORAU/Pasteurization/PAS_04_000.htm
9. **Exhibit 9:** 21 C.F.R. § 10.25(b)
10. **Exhibit 10:** 21 U.S.C. § 321(n)
11. **Exhibit 11:** 21 C.F.R. § 101.17(g)
12. **Exhibit 12:** 21 C.F.R. §§ 120.1-120.25

CONCLUSION

For the foregoing reasons, Daily Greens requests that the Court take judicial notice, pursuant to Federal Rule of Evidence 201, of the FDA guidelines, publications, websites, and Code of Federal Regulation sections attached as exhibits hereto.

Dated: March 30, 2017

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